made easier by M. Hauriou's extraordinary power of reception. No new idea seems to come to the birth without being swept into the wide ambit of his system. No science is too remote for him to examine it in the effort at discovering illustrative analogies. He seems definitely to have rejected the unsatisfactory positivism in which M. Duguit still takes refuge.[2] He insists upon the unchanging character of the categories, order and disorder, justice and injustice, of which the law must take account, even while he denies the permanent character of their content.[3] He has realized that law is preëminently a social science, and that in this aspect its sociological character is fundamental. In this respect, he seems clearly to belong to the realist school of which M. Duguit is perhaps the most distinguished member. But he explains the background of his attitude in an atmosphere of metaphysiological metaphor which M. Duguit would hardly understand. The lawyer meets with some concern such phrases as "social tissue," with its constituent "positive" tissues of the family and property, "metaphysical tissues" such as the law, and "material tissues" such as organization.[4] It is true that these somewhat mysterious entities lead to the recognition of liberty, equality and fraternity as the essential factors of progress;[5] but one is left wondering if the path of proof must of necessity be so complex. Certain conceptions of his thought possess, indeed, a definition less puzzling. He has set out clearly the significance of corporate personality.[6] He has insisted in striking fashion on the necessary submission of the state to objective law. He has shown with high distinction the way in which law emerges as the result of a balance between conflicting and coöperating forces.[7] His work has demonstrated the danger of a régime in which the individual personality is absorbed by the fabric of the state.[8] The somewhat mysterious result of his whole legal edifice is perhaps the outcome of his own eager insistence upon the necessary complexity of social relations, perhaps also from his unwillingness to set out his principles as a system apart from the multitude of facts which tend to obscure their bearing. No student of law, in any case, may afford to neglect an effort so rich in its possibilities and so suggestive in its outcome.

EFFECT OF CHANGED CONDITIONS UPON EQUITABLE SERVITUDES. — In *Tulk* v. *Moxhay*,[1] which is the foundation of the law of equitable servitudes, Lord Cottenham evidently thought purely in terms of specific performance. He conceived that he was enforcing the covenant imposing the restrictions against one not a party thereto, who had

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[2] *Cf.* his LES IDÉES DE M. DUGUIT, RECUEIL DE LÉGISLATION DE TOULOUSE, Vol. VII, 15–16.

[3] *Cf.* PRINCIPES DE DROIT PUBLIC (1910).

[4] *Cf.* LA SCIENCE SOCIALE TRADITIONELLE (1896), 264.

[5] *Ibid.*, 49 *ff.*

[6] PRINCIPES DE DROIT PUBLIC (1910), 639–93.

[7] *Ibid.*, chap. I.

[8] *Cf.* especially, *Ibid.*, 366–414 and 471–594.

[1] 2 Phil. 774 (1848).

acquired the property with knowledge thereof, in order to prevent unjust enrichment.[2] But it has been pointed out repeatedly that this reasoning assumes the existence of the rule as the basis for explaining its existence.[3] Hence, although there are decisions which continue to treat the matter from the standpoint of specific performance,[4] the current of authority[5] for some time has perceived that we have here real rights rather than contract rights and has recognized in these restrictions on the use of property imposed by contract a sort of equitable appendix to the common law servitudes to which, as some courts are now doing,[6] we may well give the name of "equitable servitudes."

Suppose the situation which existed at the time the restrictions were imposed, continuance whereof was a presupposition of the restrictions, has radically changed, so that the original purpose may no longer be carried out. Courts have often treated such cases on lines of specific performance, arguing that as it would be inequitable to enforce the restriction under the changed circumstances, doing the plaintiff little substantial good and seriously injuring defendant, a court of equity may properly refuse relief on the balance of convenience.[7] It will have been noted that some of these courts have, in other connections, treated such restrictions as servitudes involving real rights in the covenantees and those claiming under them. The inconsistency of denying relief on a theory of discretion as to specific performance with such a doctrine, since it in substance allows a court of equity in its discretion to deprive a plaintiff of his property,[8] led several courts to retain the injunction suit for assessment of damages, after denial of the injunction[9] or to suggest that damages might be recovered[10] or to award damages on

[2] "The question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken." *Id.*, 777–78. See Ames "Specific Performance For and Against Strangers to the Contract," 17 HARV. L. REV. 174, 183.

[3] The latest statement is by Professor Clark, "Equitable Servitudes," 16 MICH. L. REV. 90, 91.

[4] Wiegman *v.* Kusel, 270 Ill. 520, 527, 110 N. E. 884 (1915); DeGray *v.* Monmouth Beach Club House Co., 50 N. J. Eq. 329, 339, 24 Atl. 388 (1892); Doan *v.* Cleveland R. Co., 92 Ohio St. 461, 112 N. E. 505 (1915); Bald Eagle Valley R. Co. *v.* Nittany Valley R. Co., 171 Pa. St. 284, 295, 33 Atl. 239 (1895).

[5] *Re* Nisbet and Potts' Contract [1905] 1 Ch. 391, 399, [1906] 1 Ch. 386, 401 *ff.*, 405, 409; Childs *v.* Boston & Maine R. Co., 213 Mass. 91, 94, 99 N. E. 957 (1912); King *v.* Union Trust Co. 226 Mo. 351, 365, 126 S. W. 415 (1910); Flynn *v.* New York, etc. Ry. Co., 218 N. Y. 140, 112 N. E. 913 (1916).

[6] Childs *v.* Boston & Maine R. Co., *supra.*

[7] Jackson *v.* Stevenson, 156 Mass. 496, 31 N. E. 691 (1892); Sanford *v.* Keer, 80 N. J. Eq. 240, 83 Atl. 225 (1912); Amerman *v.* Deane, 132 N. Y. 355, 30 N. E. 741 (1892); McClure *v.* Leaycraft, 183 N. Y. 36, 75 N. E. 961 (1905); Orne *v.* Fridenberg, 143 Pa. St. 487, 502, 22 Atl. 831 (1891).

[8] See Whalen *v.* Union Bag Co., 208 N. Y. 1, 101 N. E. 805 (1913). In such cases as McCann *v.* Chasm Power Co., 211 N. Y. 301, 105 N. E. 416 (1914), plaintiff's property right is legal and he may protect it at law by an action which will prevent acquisition of a prescriptive right by the defendant.

[9] Jackson *v.* Stevenson, *supra.*

[10] McClure *v.* Leaycraft, *supra.*

condition of releasing the servitude.[11] But that course involves another difficulty. If the servitude still exists and the damages are not merely nominal, what authority has a court of equity to compel the dominant owner to sell it to his neighbor against his will for such sum as may be assessed as substantial damages? Surely when a court of equity is called on to protect a servitude from interruption it cannot say to the dominant owner in its discretion, sell out to the servient owner to whom the restriction has now become disproportionately inconvenient.[12] Awarding substantial damages in such case to an unwilling dominant owner amounts to a condemnation of the servitude without legislative authority and for a private rather than a public use.

Yet the judicial instinct that has led to denial of equitable relief in such cases seems sound. The basis of the equitable servitude is the intention of the parties. We turn to this intention to discover whether a servitude was created or a mere personal covenant.[13] For the same reason we should turn to their intention to determine the duration of the servitude. They may have fixed a definite term. But even then it is a reasonable construction to hold that they meant it to endure so long as the purpose of the restriction could be carried out, not exceeding the term fixed.[14] Hence it is submitted the sound view is that the existence of the servitude depends upon the possibility of carrying out the original purpose. If it can be carried out, want of appreciable damage to the dominant owner is not material.[15] If it can no longer be carried out, the same arguments that established its existence as a servitude may be vouched for its termination.[16] In that event there is nothing to protect by an injunction and nothing for which to award damages.

A recent case in which legislation sought to provide expressly for the procedure adopted offhand without consideration in the decisions above referred to has compelled more critical investigation.[17] In that case the statue provided that when in a proceeding for the registration of land the land court should find that enforcement of restrictions upon its use "would be inequitable" it should "register title to the land free from the restrictions as and to the extent required by the equities of the case" and that "if the restrictions are valid though not enforceable" the case should be sent to the Superior Court for assessment of damages. The facts were that the restrictions had been imposed by the petitioner and others in the expectation that the neighborhood would be devoted exclusively to expensive private residences. Afterwards the construction of subways, extension of rapid transit and use of automobiles made more distant areas better available and except for a few houses built on the faith of the restrictions the tract has remained vacant. Under

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[11] Amerman *v.* Deane, *supra.*

[12] See Dent *v.* Auction Mart Co., L. R. 2 Eq. 238, 245 (1866).

[13] See, for example, Nottingham Brick & Tile Co. *v.* Butler, 16 Q. B. D. 778 (1886).

[14] Association *v.* Gordon, 63 N. H. 505, 506, 3 Atl. 426 (1885).

[15] Peck *v.* Conway, 119 Mass. 546 (1876). Nor does it matter that change of circumstances has made the servitude much more inconvenient to the servient owner, so long as the original purpose may be carried out. Miller *v.* Klein, 177 Mo. App. 557, 160 S. W. 262 (1913); Spahr *v.* Cape, 143 Mo. App. 114, 122 S. W. 379 (1909).

[16] See an excellent discussion in Knight *v.* Simmonds, [1896] 2 Ch. 294.

[17] Riverbank Improvement Co. *v.* Chadwick, 228 Mass. 243, 117 N. E. 244 (1917).

such circumstances the land court found that it would be inequitable to enforce the restrictions so far as they prevented the erection of apartment houses or buildings for business purposes, but that the removal of the restrictions would result in material damage to those who had already built. Accordingly it registered the title free of the restrictions under the statute. The Supreme Court, reaffirming what is now the established doctrine in Massachusetts, held that the restrictions created real rights in the dominant owners, and as a consequence held that the statute, applied to such a case, deprived the latter of rights in real property for a private use contrary to the Bill of Rights.

Here the original purpose could be carried out for the protection of the houses already built. True the tract was not developing as fast as had been hoped because of supervening events. In consequence, a greatly increased burden was put upon the servient owners, which might be material upon a question of specific performance, but had no relevance upon a question of property. Once the latter view is taken, the decision reached is inevitable. Had the change of condition been such that the original purpose could no longer be carried out, no special statute would be necessary to permit registration of the title free of restrictions that no longer exist. To do so would be no more than removing a cloud cast by the recorded restrictions. Moreover if the tract in question was needed for business purposes for the proper development of the city and the restrictions resulted in the tract remaining vacant and useless, a statute permitting registration of title free of the restrictions upon compensation in order to permit the only practicable use of the land and thus make it available for the general good might be sustained.[18] However this may be, the statute in the present case proceeded on no such theory. It sought to allow the servient owners to relieve themselves of an irksome burden by compelling the dominant owners to make an involuntary sale and raises a strong suspicion of having been made to order for this very case.

IMPAIRMENT OF CONTRACTS BY MUNICIPALITIES. — It has long been settled that municipal legislation may be state action within the constitutional provision forbidding laws impairing the obligations of contracts.[1] It is also decided that some municipal action does not come within the clause.[2] A mere breach of contract by a municipal corporation does not raise a federal question.[3] Two recent decisions by the Supreme Court of the United States are of value in indicating the lines of demarcation between these two positions and, by the dissenting opinions, in showing the reasons for the judicial confusion of mind on the subject.[4] In both of

[18] Clark *v.* Nash, 198 U. S. 361 (1905); Strickley *v.* Mining Co., 200 U. S. 527 (1906). But see Salisbury Land Co. *v.* Commonwealth, 215 Mass. 371, 379, 102 N. E. 619 (1913).

[1] Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1.

[2] St. Paul Gas Light Co. *v.* St. Paul, 181, U. S. 142.

[3] McCormick *v.* Oklahoma City, 236 U. S. 657.

[4] Cincinnati *v.* Cincinnati & Hamilton Traction Co. and the Ohio Traction Co., 38 Sup. Ct. Rep. 153.

The Northern Ohio Traction & Light Co., and the Cleveland Trust Co. *v.* the State of Ohio, 38 Sup. Ct. Rep. 196.